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Countrywide Home Loans Servicing LP,  
Countrywide Capital Markets, LLC,  
Countrywide Securities Corporation,  
CWALT, Inc., CWABS, Inc., CWHEQ,  
Inc., and CWMBS, Inc.

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

IN re COUNTRYWIDE FINANCIAL  
CORP. MORTGAGE-BACKED  
SECURITIES LITIGATION CASES

Case No. 11-ML-02265-MRP (MANx)

**COUNTRYWIDE DEFENDANTS'  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
THEIR MOTION TO DISMISS  
PLAINTIFFS' AMENDED  
COMPLAINT**

Date/Time: May 17, 2012 / 11:00 a.m.  
Courtroom: 12  
Judge: Hon. Mariana R. Pfaelzer

THRIVENT FINANCIAL FOR  
LUTHERANS, *et al.*,

Plaintiffs,

v.

Case No. 11-CV-07154-MRP (MANx)

1 COUNTRYWIDE FINANCIAL  
2 CORPORATION, *et al.*,  
3 Defendants.

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**PRELIMINARY STATEMENT**

On March 9, 2012, Plaintiffs filed an amended complaint in this matter. On February 17, 2012, the Court previously dismissed the following claims without prejudice: (1) fraudulent misrepresentation, reckless misrepresentation, and fraudulent inducement claims that concern title transfer allegations; (2) aiding and abetting fraud claims against all Defendants; (3) negligent misrepresentation claims against all Defendants; and (4) successor liability claims against the Bank of America Defendants.<sup>1</sup> See Order re: Motions to Dismiss, dated February 17, 2012, Docket No. 170 (“Dismissal Order”). The Amended Complaint states that Plaintiffs opted only to amend their successor liability claims and no others, and that they repeated (but did not amend) their previous negligent misrepresentation, aiding and abetting, and transfer of title-related claims that the Court had dismissed without prejudice “solely and exclusively to preserve [their] appellate rights.” Amended Complaint (“AC”) at 1 n.1. Because Plaintiffs chose not to amend these claims, they should now be dismissed *with prejudice*.

**ARGUMENT**

**I. THE NEGLIGENT MISREPRESENTATION, AIDING AND ABETTING, AND TITLE TRANSFER CLAIMS MUST BE DISMISSED WITH PREJUDICE.**

In the Dismissal Order, the Court dismissed Plaintiffs’ aiding and abetting claims for failure to plead the required element of substantial assistance (Dismissal Order at 10-11), the negligent misrepresentation claims for failure to plead a duty of care under Minnesota law and “any facts from which the Court could infer that the transaction was other than an arms-length business transaction between equals” (*id.* at 11-12), and the fraudulent misrepresentation, reckless misrepresentation, and fraudulent inducement claims, to the extent such claims are premised on transfer of

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<sup>1</sup> The Bank of America Defendants are Bank of America Corp., BAC Home Loans Servicing, LP, and NB Holdings Corporation. AC ¶¶ 28-31.

1 title allegations, because Plaintiffs’ title transfer allegations “fail to identify a  
2 misstatement with sufficient particularity” (*id.* at 10).

3 Plaintiffs acknowledge these dismissals in the Amended Complaint, stating  
4 that they have “not amended those claims, but [have] included them . . . solely and  
5 exclusively to preserve [their] appellate rights.” AC at 1 n.1. These claims thus still  
6 appear in the Amended Complaint. *See id.* ¶¶ 288-93 (aiding and abetting fraud); *id.*  
7 ¶¶ 294-308 (negligent misrepresentation); *id.* ¶¶ 166-67<sup>2</sup> (title transfer). Because  
8 this Court has already held these claims to be inadequately pled,  
9 Plaintiffs’ decision not to amend them requires that they now be dismissed with  
10 prejudice. The Ninth Circuit’s words in *Pratts v. Sujana*, 176 F.3d 484, 1999 WL  
11 274662, at \*1 (9th Cir. Apr. 23, 1999), are controlling here:

12 [Plaintiff] was given leave to amend his claims by the district court, as  
13 well as instruction on what he needed to allege to state valid claims,  
14 but [plaintiff] chose not to amend. This failure means his . . . claims  
15 are now dismissed with prejudice.

16 *Cf. Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004) (“[T]he  
17 district court should have taken the election not to amend at face value” and  
18 “entered a final judgment dismissing all claims with prejudice.”); *London v.*  
19 *Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) (district court “acted  
20 properly” when it dismissed plaintiff’s cause of action on the basis that plaintiff  
21 “failed to amend” the claim in her amended complaint); *see also Dietz v. Beneficial*  
22 *Loan & Thrift Co.*, 2011 WL 6739504, at \*3 (D. Minn. Dec. 22, 2011) (“Plaintiffs  
23 have failed to amend their [Truth in Lending Act] claims so as to adequately allege a

24 \_\_\_\_\_  
25 <sup>2</sup> While Plaintiffs’ Amended Complaint contains allegations regarding title transfer  
26 misrepresentations (AC ¶¶ 166-67), Plaintiffs deleted from their Amended  
27 Complaint an entire section (22 paragraphs) of allegations entitled “Countrywide  
28 and GMAC Failed To Ensure That Title To The Underlying Loans Was Effectively  
Transferred” that appeared in the original complaint. *Compare* Compl. ¶¶ 167-89  
with AC ¶¶ 166-67. Thus, the title transfer allegations in the Amended Complaint  
are even *more* deficient than those that the Court already found to be insufficient.

1 claim for rescission. Accordingly, Plaintiffs' rescission claims are properly  
2 dismissed [with prejudice]."). As such, the Court should dismiss Plaintiffs'  
3 fraudulent misrepresentation, reckless misrepresentation, and fraudulent inducement  
4 claims (to the extent they are premised on transfer of title allegations), as well as  
5 their aiding and abetting and negligent misrepresentation claims, with prejudice.

6 **CONCLUSION**

7 For all the reasons set forth above, the Countrywide Defendants respectfully  
8 request that the Court dismiss with prejudice Plaintiffs' negligent misrepresentation  
9 claims, aiding and abetting claims, and remaining fraudulent misrepresentation,  
10 reckless misrepresentation, and fraudulent inducement claims based on title transfer  
11 allegations.

12 Dated: March 30, 2012

**GOODWIN PROCTER LLP**

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